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No. 04-1044

Supreme Court, U.S.
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In The
Supreme Court of the United States

PROVIDENCE HEALTH PLAN,
an Oregon non-profit corporation,

Cross-Petitioner,

v.

GARY McDOWELL and ROSELEA McDOWELL,

Cross-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY IN SUPPORT OF CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Cross-Petitioner's sole member is Providence Plan Partners, a Washington non-profit corporation, whose sole member is Providence Health System-Oregon, an Oregon non-profit corporation ("PH-OR"). PH-OR has as its sole member the Sisters of Providence-Mother Joseph Providence, a Washington non-profit corporation, which has as its members the Provincial Superior and members of the Provincial Counsel of the Sisters of Providence-Mother Joseph Providence.

There are no publicly held companies that own more than ten percent of the stock of respondent, its members, or its members' members. Cross-Petitioner is a non-profit corporation and has no stock.

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REPLY IN SUPPORT OF CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

This reply responds to four of the new points raised in the cross-respondents' Opposition to Conditional Cross-Petition for Writ of Certiorari ("Opposition"). Supreme Court Rule 15.

In their opposition, cross-respondents incorrectly construe the rationale behind the cross-petition for writ of *certiorari*. Cross-petitioner submits that neither of the cases that are the subject of the Ninth Circuit's decision warrant review by this Court. The Ninth Circuit correctly decided *McDowell* I when it concluded that the federal court lacked removal jurisdiction over cross-petitioner's state law breach of contract claim. However, if the Court chooses to review the merits of *McDowell* I, it should grant *certiorari* in *McDowell* II as well so that it can resolve fully and finally the question of whether and where cross-petitioner's state law breach of contract claim to enforce cross-respondents' contractual reimbursement obligation can proceed.

If the Court decides that *McDowell* I was wrongly decided, that decision, without more, will leave fiduciaries like cross-petitioner with no available remedy at law. Therefore, under federal common law equitable principles, cross-petitioner should have a claim for "appropriate equitable relief" under the Employment Retirement Income Security Act of 1974 ("ERISA"). *See* 29 U.S.C. § 1132(a)(3)(B); *see also, Porter v. Warner Holding Co.*, 328 U.S. 395, 398, 66 S. Ct. 1086, 90 L. Ed.1332 (1946) (where no restriction in statute, full scope of equitable jurisdiction should be recognized and applied). This is the issue raised

by *McDowell* II.[1] To put the questions raised in these cases to rest fully and completely, the Court must have the related issues raised in both *McDowell* I and *McDowell* II before it.

Cross-respondents claim that "cross-petitioner did have adequate remedies at law, but chose not to pursue them." Opposition at 6. The legal theories referenced by cross-respondents include subrogation, reimbursement from the tortfeasors' insurance carrier and intervention in the cross-respondents' Washington state court action. *Id.* These claims are simply other state law legal theories by which cross-petitioner might enforce cross-respondents' contractual obligation to reimburse cross-petitioner for benefits paid on cross-respondents' behalf and later recovered from a third party. If cross-petitioner's state law breach of contract claim is completely preempted by ERISA, these other state law theories for accomplishing the same result would be preempted as well.

Cross-respondents also argue about the facts of this case. *See* Opposition at 1-3. *McDowell* II was decided by the trial court on a motion to dismiss. In addressing a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the material allegations in the complaint are taken as true. *Cruz v.*

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[1] Cross-respondents rely on Magistrate Judge Coffin's and the Ninth Circuit's decisions in *McDowell* II, to assert that *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), forecloses the claim made by cross-petitioner in *McDowell* II. Response at 4-6. In fact, *Great-West* did not consider the specific circumstance presented in *McDowell* II – whether a health care services contractor that lacks any adequate remedy at law can proceed with a claim for "appropriate equitable relief" under 29 U.S.C. § 1132(a)(3). If the Court reverses the outcome in *McDowell* I, the issue raised by *McDowell* II will be squarely presented for resolution in this case.

Beto, 405 U.S. 319, 322, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972). This Court should disregard the factual arguments made by cross-respondents that are inconsistent with the facts alleged by cross-petitioner in its complaint.

Finally, cross-respondents assert that claim preclusion bars the claims in *McDowell* II. Claim preclusion does not apply. Cross-petitioner could not assert a claim for "appropriate equitable relief" until the district court in *McDowell* I determined that cross-petitioner had no adequate remedy at law. *See, e.g., Int. Ass'n of Machinists v. Aloha Airlines*, 790 F.2d 727, 731 (9th Cir. 1986) (res judicata is no defense where a claim involving same facts could not have been brought in earlier lawsuit because "it would be inequitable to require a party to simultaneously assert that the federal courts lack jurisdiction . . . and that the federal courts have jurisdiction. . . ."). Claim preclusion does not bar substantive review by this Court.

CONCLUSION

For the reasons discussed above, and for the reasons set forth in the conditional cross-petition for writ of *certiorari*, if the Court grants the petition for writ of *certiorari* in *McDowell* I, it also should grant the conditional cross-petition for writ of *certiorari* in *McDowell* II.

Respectfully submitted,

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